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CONSTITUTIONAL PROVISIONS AND STATUTES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1180

OLD DOMINION BRANCH NO. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, *Appellants,*

v.

HENRY M. AUSTIN, L. D. BROWN, and ROY P. ZIEGENGEIST, *Appellees.*

On Appeal From a Judgment of the Supreme Court of Virginia

BRIEF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS AMICUS CURIAE

This brief amicus in support of the position of the Appellees, Henry M. Austin, L. D. Brown, and Roy P. Ziegengeist, and in support of the legal rights of other non-union employees in the United States, is filed by the National Right to Work Legal Defense Foundation with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTERESTS OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is an organization formed to protect the right to work, freedom of association, and other fundamental liberties of ordinary working men and women

where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation is vitally interested in aiding any employee whose human and civil rights have been abridged or are about to be abridged through the injustices arising out of compulsory unionism arrangements. Thus, it is concerned with protection of the legal right of any individual to refrain from joining or paying dues to a labor organization against his will, and with compensation for damages where this legal right has been abridged.

There are responsibilities which are inherent in organizing activities. Subjecting an individual or individuals to defamatory and damaging epithets, which are calculated to create an atmosphere of violence and coercion, is a perversion of the legitimate objectives of unionism and cannot and must not be condoned. With organizing activities goes both a moral and legal responsibility on the part of the union to treat the unorganized in a civilized and humane manner.

STATEMENT

Appellant Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO, hereafter referred to as Branch, is a local union which is an agent of and is affiliated with Appellant National Association of Letter Carriers, AFL-CIO, hereafter referred to as NALC. Under Executive Order 11491, and, subsequently, the Postal Reorganization Act and the National Labor Relations Act, the postal authorities at all relevant times have recognized NALC as the national and Branch as the local exclusive collec-

tive bargaining representative of letter carriers in the Richmond, Virginia area. During the period relative herein, the Appellees, letter carriers, were not members of NALC but were forced as a result of Executive Order 11491 to be represented by NALC and its agent Branch.

Branch from time to time published the names of nonmembers, including the Appellees, under the heading "List of Scabs" in its monthly newsletter, which is distributed by mail to the members of Branch. In the June, 1970 issue, Branch printed the "List of Scabs" and, along with this list, a highly uncomplimen-

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[1] "The Scab"

"Some co-workers are in a quandary as to what a scab is; We submit the following: After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which he made a scab.

"A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

Where others have hearts, he carries a tumor of rotten principles.

"When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of Hell to keep him out.

"No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

"Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

"Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class."

tary libelous statement on "What a Scab Is."[1] This issue was posted on a post office bulletin board where anyone could see it.

As a result of these malicious, insulting, defamatory, and slanderous statements, the Appellees filed suit against the Appellants in the Law and Equity Court of the City of Richmond, Virginia under the Virginia Insulting Words Statute, Code of Virginia Annotated (1950), § 8-630. The jury returned a verdict awarding each of the Appellees $10,000 in compensatory damages and $45,000 in punitive damages. On appeal, the Supreme Court of Virginia rejected Appellants' claims that the insulting words statute, on its face and as here applied, violated Appellants' right to freedom of speech.

SUMMARY OF ARGUMENT

This Court has held that the exercise of state court jurisdiction is not precluded by national labor policy where the conduct in question was not protected under the Labor Management Relations Act. The conduct in issue, in this case, is prohibited by the Virginia Insulting Words Statute, which is constitutional because it is a defamation statute and because it does not proscribe speech protected under the First and Fourteenth Amendments. The First and Fourteenth Amendments have never protected defamation.

The circumstances in this case clearly show that the Virginia Supreme Court of Appeals correctly held that the *New York Times* standard of malice is not applicable. However, should this Court find that this standard of malice does apply, the decision of the Virginia Supreme Court of Appeals should not be reversed because this standard has been met.

ARGUMENT

I

EXERCISE OF STATE COURT JURISDICTION IS NOT PRECLUDED BY NATIONAL LABOR POLICY WHERE CONDUCT NOT PROTECTED UNDER THE LABOR MANAGEMENT RELATIONS ACT IS INVOLVED.

In the field of labor relations, there are some areas which are not preempted by the exclusive jurisdiction of the National Labor Relations Board under the Labor Management Relations Act, 29 U.S.C. § 141 et seq. Activities engaged in by unions and employers arising out of a labor dispute may be regulated by the states if such activities are neither protected nor prohibited under the Labor Management Relations Act, and do not come within the legislative purpose of that statute. *International Union, UAW, AFL, Local 232* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh.den'd* 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121 (1949) and *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Ass'n, AFL-CIO,* 382 U.S. 181, 86 S.Ct. 3207, 15 L.Ed. 2d 254 (1965). The federal statute does not impliedly exclude the exercise of state powers in the case of conduct which the National Labor Relations Board is without express power to prevent and which therefore either is governable by the state or is entirely ungoverned. *Garner* v. *Teamsters,* 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953) and *UAW* v. *WERB, supra.*

Mr. Justice Jackson said, for a unanimous Court in *Garner* v. *Teamsters Union, supra*:

> The . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible. 346 U.S. at 488, 74 S.Ct. at 164, 98 L.Ed. at 238.

Then in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), this Court emphasized that it was for the Board and the Congress to define the "precise and closely limited demarcations that can be adequately fashioned only by legislation and administration," while "our task is confined to dealing with classes of situations." 359 U.S. at 242, 79 S.Ct. at 778, 3 L.Ed.2d at 781. In this respect, it concluded that the states need not yield jurisdiction "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 243-244, 79 S.Ct. at 779, 3 L.Ed.2d at 782. This Court, citing *Garmon, supra,* in *Local 100 of United Association of Journeymen and Apprentices* v. *Borden,* 373 U.S. 690, 693-694, 83 S.Ct. 1423, 1425, 10 L.Ed.2d 638, 641 (1963) said:

> In the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential if the danger of state interference with national policy is to be averted, . . . and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal pre-emption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance.

In this case the conduct in question is not subject to the jurisdiction of the Board and there is present a compelling state interest to prevent language insulting and abusive to its citizens and designed to incite violence and breach of the peace. This is not an action that involves regulation of labor relations and it is not concerned with the merits of a labor dispute. *Brantley* v. *Devereaux,* 237 F.Supp. 156 (E.D.S.C. 1965).[2]

In *Linn* v. *United Plant Guard Workers of America, Local 114, et al.,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), a case involving defamatory statements made during an organizing campaign, this Court said:

> We conclude that where either party to a labor dispute circulates false and defamatory statements during a union organizing campaign, the Court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him. 383 U.S. at 55, 86 S.Ct. at 658, 15 L.Ed.2d at 586.

This Court said that although the Board "tolerates intemperate, abusive and inaccurate statements made by the union during the attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false." 383 U.S. at 61, 86 S.Ct. at 662, 15 L.Ed.2d at 589.

The Appellant would have this Court believe that the insulting language used in this case was protected

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[2] This case involved a false statement made by an employer about a union member during a bargaining session. The defamed individual brought a common law action for slander. The court refused to dismiss the case on the basis of pre-emption.

under the *Linn* decision. Nothing could be further from the truth. This Court said in *Linn*:

> But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses. 383 U.S. at 63, 86 S.Ct. at 663, 15 L.Ed. 2d at 590.

This Court in *Linn* recognized that the Board cannot award any damages, impose any penalty, or give any other relief to a defamed individual. In fact, this Court pointed out:

> On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption. 383 U.S. at 63-64, 86 S.Ct. at 663-664, 15 L.Ed.2d at 590.

II

THE VIRGINIA INSULTING WORDS STATUTE IS CONSTITUTIONAL BECAUSE IT IS A DEFAMATION STATUTE AND BECAUSE IT DOES NOT PROSCRIBE SPEECH PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

A. Defamatory Speech Is Not Protected Under the First and Fourteenth Amendments.

1. What constitutes defamation.

A communication is "defamatory" if it tends to harm the reputation of another so as to lower him in the estimation of the community, or to deter third persons from associating or dealing with him. *McAndrew* v. *Scranton Republican Pub. Co.*, 165 Pa. Super.

276, 67 A.2d 730 (Super. Ct. 1949); *Albert Miller & Co.* v. *Corte,* 107 F. 2d 432 (5th Cir. 1939); and *D'Amato* v. *Freeman Printing Co.,* 38 Wis. 2d 589, 157 N.W.2d 686 (Wis. 1968). It has also been said that 'defamation' is that which tends to injure the reputation or to diminish the esteem, respect, good will, or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff. *Local 15 of Independent Workers of Noble County, Inc.* v. *IBEW,* 273 F.Supp. 313 (N.D. Ind. 1967). In *Ward* v. *Painters Local 300,* 41 Wash.2d 859, 252 P.2d 253 (Wash. 1950) the court said, while permitting as privileged comments about a union official, that a publication is libelous or actionable per se, if, among other things, it tends to harm one in his business or occupation.

An allegedly libelous matter is defamatory not only if it subjects a party to hatred, contempt, or ridicule by asserting some moral discredit on his part, but also if it tends to make him be shunned or avoided, or deprived of the friendly association of a considerable number of respectable members of a community, though it imputes no moral turpitude to him. *Brown* v. *DuFrey,* 1 N.Y.2d 190, 134 N.E.2d 469 (N.Y. 1956). Defamation consists in malicious poisoning of the minds of others against the libeled party by printing, writing, or otherwise publishing libel, whether done directly by the wording or indirectly by insinuation, imputation, or suggestion. *Hughes* v. *Samuels Bros.,* 179 Iowa 1077, 159 N.W. 589, 592 (Iowa 1916).

Any written words are defamatory which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which thus, by engendering an evil opinion of him in the minds of right thinking men, tend to deprive him of their friendly intercourse and society. *Houston Printing Co.* v. *Moulden,* 15 Tex.Civ.App. 574, 41

S.W. 381, 386 (Ct. of Civ. App. 1897); *Owens* v. *Scott Publishing Co.*, 46 Wash.2d 666, 284 P.2d 296 (1955), *cert.den'd* 350 U.S. 968, 76 S.Ct. 437, 100 L.Ed. 840 (1956).

No statement is actionable as defamatory if it is privileged. However, the Union Appellants have no legal interest which entitled them to use the very extreme, false, ungrounded, and abusive statements directed toward the Appellees. Secondly, Appellants cannot claim an honest belief that Appellees are without character, unprincipled, and traitors to their country, families, and fellow working man. Thus, they cannot claim that their defamatory statements were privileged. *Owens* v. *Scott Publishing Co., supra.*

In this case there is no common interest evident which would justify the epithets which came from the Union publications and which were directed toward the Appellees to abuse and insult them. The Union could have informed its members of the actions of Appellees without resorting to the extremely irresponsible statements and descriptions which it made, especially owing to the fact that the Appellees' nonmembership status was and still is within the provisions of the law governing labor relations in the postal service. Thus the Appellants cannot be sustained in their argument that what was said was privileged under the common interest exception to libel and slander.

While a union can within limits collectively persuade and use social pressure to induce nonmembers to join, it must not be given *carte blanche* permission to engage in the making of false, abusive, insulting, and defamatory statements all in the name of persua-

sion. Organizational activity must carry with it responsibility to treat individuals in a nonlibelous manner.

The Union Appellants would have this Court believe that the attack on the plaintiff Appellees was not directed at them specifically as individuals. However, the description of a "scab" in derogatory and vile terms preceeded a list of individuals to which this description applied and of which the plaintiff Appellees were a part.

2. The First and Fourteenth Amendments have never protected defamation.

This Court has said that:

> The First and Fourteen Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any cirstances that he chooses. *Cohen* v. *California,* 403 U.S. 15, 19, 91 S.Ct. 1780, 1785, 29 L.Ed.2d 284, 291 (1971).

The right to the enjoyment of private reputation, unassailed, is of ancient origin and necessary to human society, and the constitutional guarantees of freedom of speech and of the press do not establish an exemption from the common-law liability for libel and slander. *Maryland Drydock Co.* v. *NLRB,* 183 F.2d 538 (4th Cir. 1950); *Caldwell* v. *Crowell-Collier Publishing Co.,* 161 F.2d 333 (5th Cir. 1947), *cert. den'd* 332 U.S. 766, 68 S.Ct. 74, 92 L.Ed. 351 (1947). *Beauharnais* v. *Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952), *reh. den'd* 343 U.S. 988, 72 S.Ct. 1070, 96 L.Ed. 1375 (1952), stands as authority for the proposition that these guarantees do not render void statutes enacted for the purpose of defining and punish-

ing libel and slander as torts or crimes. Also see *Porter* v. *Kimzey,* 309 F.Supp. 993 (N.D. Ga. 1970), *aff'd* 401 U.S. 985, 91 S.Ct. 1237, 29 L.Ed.2d 525 (1971) and *Trimble* v. *Johnston,* 173 F.Supp. 651 (D.D.C. 1959).

In *Maryland Drydock, supra,* the Company refused to permit the union to distribute defamatory literature. The court said:

> Counsel for the Board argued that the action of the company was an abridgement of the freedom of speech guaranteed by the Act; but we regard this contention as so utterly lacking in merit as hardly to warrant consideration. *Freedom of speech nowhere means freedom to publish libelous and defamatory matter and nowhere does it mean freedom to wantonly lampoon or insult anyone.* 183 F.2d at 541 (emphasis added).

The protective cloak of the constitutional freedoms of speech and press is limited in its scope. It cannot be claimed that under these freedoms there is a right to publish, or any individual is free to utter, libels and slanders. *Beauharnais* v. *Illinois, supra; Near* v. *Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *Robertson* v. *Baldwin,* 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715 (1897); and *Williams Printing Co.* v. *Saunders,* 113 Va. 156, 73 S.E. 472 (Va. 1912).

The freedom of speech and of the press does not permit the publication of libelous, blasphemous, or indecent articles, or other publications injurious to public morals or private reputation. *Robertson* v. *Baldwin, supra.* The situation with public officials however is somewhat different as regards the imposition of sanctions upon expressions critical of the official conduct of

such public officials such as was present in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).[3] Appellees are not public officials or public figures, and their situation is not one of public or general interest.

The constitutional right of free speech is not violated by a state statute which makes it a crime to address any offensive, derisive, or annoying word to any person lawfully in a public place or to call him by any offensive or derisive name, when the statute is construed by the state courts as forbidding only such words as have a direct tendency to cause acts of violence by the person to whom they are addressed and application of such a statute to one who calls another a "damn racketeer," and "damn fascist," does not substantially infringe upon the constitutional right of free speech. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Citing *Cantwell* v. *Connecticut,* 310 U.S. 296, 309, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 1221 (1940) this Court in *Chaplinsky* v. *New Hampshire* said:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been

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[3] This Court expanded the *New York Times* standard to "public figures" in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) and to matters of "public or general interest" in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971).

> well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution,* and its punishment as a criminal act would raise no question under that instrument. 315 U.S. at 571-572, 62 S.Ct. at 769, 86 L.Ed. at 1035 (Emphasis added).

While *Thornhill* v. *Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940) permits and authorizes the dissemination of information concerning the facts of a labor dispute and includes them within the area of free discussion that is guaranteed by the Constitution, in no way did this Court, as suggested by the Appellants, authorize and permit the insulting and abuse of an individual who disagreed with the speaker. This case involved picketing and an Alabama statute unconstitutional on the basis that it violated the free speech First Amendment right granted by the Constitution. Picketing to inform the public of a given situation between employees and their employer is a far cry from making and publishing vile accusations about a fellow employee with whom the makers of such accusations disagree.

B. Virginia Statute Is a Defamation Statute.

Section 8-630, Code of Virginia Annotated (1950) provides:

> All words which from their usual construction and common acceptation are construed as insults and tending to violence and breach of the peace shall be actionable.

The United States District Court in *Marsh* v. *Commercial and Savings Bank of Winchester, Virgina,* 265 F. Supp. 614 (W.D. Va. 1967) cited *Carwile* v. *Richmond Newspapers,* 196 Va. 1, 82 S.E.2d 588 (1954) as authoritative in construing the Virginia Insulting Words Statute. In that case the Virginia Supreme Court of Appeals said that an action under this statute is treated precisely as an action for slander or libel, for words actionable *per se,* with one exception, namely, no publication is necessary. The trial for an action for insulting words is completely assimilated to the common law action for libel or slander and from the standpoint of the Virginia law it is an action for libel or slander. See also *O'Neil* v. *Edmonds,* 157 F. Supp. 649 (E.D. Va. 1958) (dictum).

The Virginia court said in *Peoples Life Insurance of Washington, D.C.* v. *Talley,* 166 Va. 464, 186 S.E. 42 (1936):

> It is well recognized that, when the words complained of are uttered upon an occasion of qualified privilege, then in order to recover, it must appear from the evidence that the language used was disproportioned in strength and violence to the occasion, or went beyond the exigency of the occasion, or that the occasion was abused to gratify the ill-will of the defendant; in other words, that the defendant was acting from actual malice. 186 S.E. at 44.

The Virginia Insulting Words Statute confines that class of words which are insulting to those which are so classified by their "usual construction and common acceptation." Appellants have compared a Georgia statute recently declared unconstitutional with the Virginia Statute in question. The Georgia Statute de-

clared unconstitutional in *Gooding* v. *Wilson,* 405 U.S. 518, 92 S. Ct. 1103, 31 L.Ed.2d 408 (1972) was first of all a criminal statute which as such must be strictly construed and secondly it did not set forth a determining criteria as the Virginia Statute does. The insulting words under the Virginia Statute would be "fighting words" determined to be actionable in *Chaplinsky* v. *New Hampshire, supra.* Furthermore, in *Gooding,* the Georgia court had never put any limits on the language to be included within the statute but the Virginia courts have determined the language which is actionable to be that which would be actionable as libel and slander and they have continuously and uniformly applied this criteria in actions brought under this statute.

Mr. Chief Justice Burger and Mr. Justice Blackmun pointed out in their dissent in *Gooding* that the majority based its opinion on the lack of qualifying criteria by the Georgia courts. This can not be the case with the Virginia statute because it has been narrowly defined by the courts of that state.

Although the Virginia Insulting Words Statute does not enumerate which words are actionable under the statute, it leaves to a jury to decide which words from their usual construction and common acceptation are in fact and can be construed as insults tending to violence and breach of the peace. The matter is thus left for determination under the accepted standards of the community, much the same as would be the case with an obscenity standard.

Recent criteria on obscenity set by this Court in *Miller* v. *California,* U.S. , 93 S.Ct. 2607, L.Ed.2d , 41 L.W. 4925 (1973), and the other

companion pornography cases, extended the definition of obscenity and pornography permitting a jury or judge deciding an obscenity case to apply the standards of the community involved. The Court in *Miller* said:

> We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the Trial Court's charge that the jury consider state community standards, are constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a matter of fact.
>
> * * *
>
> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. 93 S.Ct. at 2619, 41 L.W. at 4930.

Appellants argue that the Insulting Words Statute is unconstitutional for vagueness. But as this Court said in *Civil Service Commission* v. *Letter Carriers,* U.S. , 93 S.Ct. 2880, 2897, L.Ed.2d , 41 L.W. 5122, 5131 (1973), "there are limitations in the English language with respect to being both specific and manageably brief" and the statute "is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." The standards, which are set by the statute and which must be considered by a jury or judge, are community standards as to what is insulting, defamatory language.

The jury instructions in the case at hand certainly fall within this criteria.[4]

With the obscenity cases, there were regulatory statutes, whereby the state prohibited the distribution of obscene materials and defined what is obscene by use of a community standard. The state in effect policed and patrolled the area of what is obscenity. With the Insulting Words Statute, the only state action that one can find is the granting of a civil action for use of words or insults tending toward violence and breach of the peace and the granting of access to the state courts for a remedy for use of such words. The state in no way performs a regulatory function as it does with the pornography statutes.

The Insulting Words Statute merely gives one individual the right to bring a civil action against another individual for the use of insults against the offended person, insults tending toward violence and breach of the peace. Then a jury of reasonable men must determine the usual construction and common acceptation of the words and then must decide if the words used did in fact tend toward violence and breach of the peace.

The Insulting Words Statute in question has been defined within sufficiently clear limits to meet constitutional requirements under *Chaplinsky, supra* and *Gooding, supra,* and the court or a jury has guidelines to follow.

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[4] Jury Instruction No. 4, paragraphs three and four.

"The statements complained of herein are to be considered defamatory and libelous if the respective plaintiffs prove by a preponderance of the evidence that such statements were in words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace.

"In determining whether or not the language complained of is

III

THE CIRCUMSTANCES IN THIS CASE CLEARLY SHOW THAT THE NEW YORK TIMES STANDARD IS NOT APPLICABLE.

The Virginia Supreme Court of Appeals squarely faced the decision in *New York Times,* which requires knowledge or reckless disregard of the falsity of a publication. That court correctly held that the *New York Times* standard was not applicable to the case at bar. In view of the *Linn* case, this holding was unquestionably correct.

Appellants have misunderstood *Linn* and have failed to present that case in its proper context. It should be noted that *Linn* involved a recurrent controversy over the extent to which the Labor Management Relations Act supersedes state law with respect to libels published during labor disputes. *Linn,* 383 U.S. at 57, 86 S.Ct. at 660, 15 L.Ed.2d at 57. Furthermore, it is obvious that the kind of "labor dispute" involved in *Linn* was a dispute between labor and management, which arguably came within the coverage of the Labor Management Relations Act. In this context, this Court said:

> It is therefore necessary to determine whether libel actions in such circumstances might transgress upon the National Labor policy. 383 U.S. at 58, 86 S.Ct. at 661, 15 L.Ed.2d at 582.

The *Linn* Court further said that the state courts would have jurisdiction to apply state remedies in a li-

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insulting and tends to violence and a breach of the peace, the words must be construed in the plain and popular sense in which the rest of the community would naturally understand them; that is, they are to be construed according to their usual construction and common acceptation under the circumstances of this case, that is, in a labor dispute."

bel action where it was proved that the statements were made with malice and that the defamed individual was injured by them. The Court also emphasized that malicious libel enjoys no constitutional protection "in any context." 383 U.S. at 63, 86 S.Ct. at 663, 15 L.Ed2d at 590.

The *Linn* Court pointed out that the threat of state libel suits would not damage or infringe free discussion in labor disputes, as the union had insisted. This Court did however recognize that any possible conflict between national labor policy and the legitimate state interests in preventing libel must be minimized. This Court continued:

> We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.
>
> The standards enunciated in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), *are adopted by analogy, rather than under constitutional compulsion.* We apply the malice test *to effectuate the statutory design with respect to pre-emption.* Construing the Act to permit recovery of damage in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel actions, and unwarranted intrusion upon free discussion envisioned by the Act. 383 U.S. at 64-65, 86 S.Ct. at 669, 15 L.Ed.2d at 591 (emphasis added).

Based on this somewhat ambiguous language, Appellants claim that even though states can now take jurisdiction over libel actions occurring in labor disputes, the *New York Times* standard of malice was

adopted "by analogy" in every such libel case. There are several reasons why this interpretation is completely erroneous. First, the internal consistency of the case does not permit this interpretation. The whole purpose and thrust of *Linn* was to settle the issue of whether or not state libel laws cover situations where defamatory language had been used in a labor dispute. This Court specifically held that state courts have jurisdiction if the plaintiff shows malice and damage.

The ambiguous statement quoted above is consistent with *Linn's* holding that state libel laws (including standards for malice) apply in the context of labor disputes. This Court, in effect, said that in this particular case, because of a dispute between the general manager of the Pinkerton Detective Agency and the union, the *New York Times* standard of malice will be applied "by analogy, *rather than under constitutional compulsion.*" (Emphasis added) *Linn* 383 U.S. at 65, 86 S.Ct. at 664, 15 L.Ed.2d at 591.[5] The ambiguity lies in determining what is meant by "analogy." Since an analogy is simply a comparison, it must be assumed that the *New York Times* standard was adopted in *Linn* because of comparable policy considerations with the *New York Times* case itself. The unique facts in *Linn* make this proper.

The defamatory language in *Linn* took place in the context of a classical "labor dispute." *Linn* was the employer, the libeler was the union, and they were engaged in a heated organizational campaign. It must be emphasized that not every controversy is a "labor dispute." "The mark of a labor dispute is the pres-

[5] Appellants neglected to cite this Court to the emphasized portion of this quote. (Appellants' Brief, pages 14, 16).

ence of economic adversaries", *Sachs* v. *Local 48, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO,* 454 F.2d 879 (4th Cir. 1972). The controversy usually involves the terms or conditions of employment. *NLRB* v. *International Longshoremen's Association,* 332 F.2d 992 (4th Cir. 1964). The relationship of employer to employee is generally present in a labor dispute. *Wojcik* v. *Ming,* 186 N.Y.S.2d 937 (App. Div. 1959).

The case at bar involves a labor dispute only in the loosest sense of the word, and it is much more closely related to a fist fight between employees in the plant than to a dispute between the employer and the employees. Because the *Linn* case was decided in the context of a labor-management confrontation, it is much more "analogous" to the *New York Times* situation than is the case at bar. Furthermore, Mr. Linn himself was much closer to being a public figure, as required by *New York Times,* than are the plaintiffs in this case.[6] Under these circumstances, it is clear that the *New York Times* standard can be applied by analogy. However, in the case at bar, the plaintiffs are not in the relationship of labor-management, and do not even approach being public figures. Thus there is no reason to apply the *New York Times* standard by analogy.

Under *Linn* the states have jurisdiction over common law libel actions even though the libelous statements occurred in the context of a labor dispute. If

[6] Mr. Linn was the general manager of a very large national detective agency which provided plant guards to many manufacturing firms throughout the Chicago area.

there are policy reasons such as the presence of a public official, public figure, or issue of general public interest, or anything analogous to this, then the *New York Times* standard of malice must be used. However, in the absence of a case in the *New York Times* context, the common law standard of malice may be used since there is no "constitutional compulsion" to use the *New York Times* standard.

Appellants would have us believe that the common law malice test gives insufficient breathing room to First Amendment rights. Appellants further cite many cases for the principle that dissemination of information in a labor dispute is within the area of free discussion guaranteed by the First Amendment but the cases cited do not deal with the issues involved in this case. (Appellants' Brief, page 18). No assertion has been made that labor organizations are not free to disseminate information among their members, or identify nonmembers with the motive of organizing them. *Thornhill* v. *Alabama, supra; Senn* v. *Tile Layers Union,* 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937); and *Cafeteria Union* v. *Angelos,* 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943). However, it is an absurdity for Appellants to contend that this definition of scab, which contains direct, libelous assertions about plaintiffs' character, is merely the "identifiication of eligible workers" for union membership. The real issue in this case, as discussed above, is whether or not plaintiffs have been defamed by the union's statement that they were unprincipled, without character, and traitors to their country, family, and fellow working man.

There are other reasons why the *New York Times* standard should not apply across the board to state

libel actions. If the *New York Times* standard was uniformly applied in all libel actions arising out of labor disputes, it would effectively and completely extinguish defamation actions. The *New York Times* standard is extremely difficult to prove since it requires that the publication be either knowingly false when made, or made with a reckless disregard for the falsity thereof. It is clear that the *New York Times* standard was established only to protect a very important value, namely free and robust public debate.

Since *New York Times,* there have been very few cases where public officials or public figures have been able to prove libel. Applying the *New York Times* standard of malice to labor disputes where non-public individuals are involved would bring about the same effect. The whole purpose of libel statutes is to give citizens a chance to redress a unique kind of wrong, i.e. damage to their reputation.

The facts of the case at bar clearly show the wisdom of a policy allowing state libel actions based on a local standard of malice.[7] It is easy to see how violence would have inevitably developed where tension was building as a result of libelous publications.

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[7] Plaintiff Austin testified that he became very angry upon being called a scab by the union steward; and also testified that the publication of the definition of scab in this case caused not only personal tension to him, but also an atmosphere of tension with his fellow employees. (Tr. 97, 98, 102). Austin also intimated that he almost took a poke at the union steward but had been "fortunate to be able to restrain myself at that time." (Tr. 117).

IV.

SHOULD THIS COURT FIND THAT THE NEW YORK TIMES STANDARD OF MALICE DOES APPLY, THE DECISION SHOULD NOT BE REVERSED BECAUSE THE NEW YORK TIMES MALICE DEFINITION HAS BEEN SATISFIED.

If this Court should find that the *New York Times* standard is applicable, the facts of the case will show that the libelous statement in question was published with reckless disregard for the truth thereof, thus meeting this standard.

Appellants contend that the *New York Times* case makes "falsehood" the *sine qua non* of recovery for libel in the context of a "public controversy."[8] Appellants further state that the publication at issue here imports but one statement of fact, that plaintiffs were willful nonmembers of the union, and that the rest is non-libelous hyperbole, which cannot be taken as an assertion of truth.

A cursory reading of the publication in question indicates clearly that it consists of both hyperbole and bald assertions which on their face are so irresponsible that it can hardly be contended that they were not made with a reckless disregard for the truthfulness thereof.

Even if most of the statement in question is in fact hyperbole and thus under many circumstances, protected by the First Amendment, sandwiched in the hy-

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[8] Appellant fails to explain how this situation suddenly is a "public controversy" when the issue is whether or not the *New York Times* standard applies, but was earlier a non-public matter when talking about the issue of qualified privilege. (Appellants' Brief, pages 20, 21 & 25).

perbole are accusations that the Appellees are without character, without principles, and traitors to their family, their country, and their fellow working man. There is no bitter organizing campaign or other circumstance which could possibly justify the use of such language. In this case, the names of the plaintiffs, labeled as scabs, were printed immediately following the libelous definition of a scab. On the basis of the evidence presented, the jury properly found that the publication in question has maliciously cast three low ranking postal employees into a bad light with many of their fellow employees, as well as the wives, family, and friends of those employees.

The fact that this publication was printed in conjunction with the names of the plaintiffs takes on added significance in view of the testimony of Mr. Kenneth Fiester, President of the International Labor Press Association, AFL-CIO. Mr. Fiester said that he had been involved in the labor movement for about forty years, and had seen this publication so often that he could not even begin to count the times. (Tr. 170) Mr. Fiester then stated on cross examination that he had never seen this article appear with names of specific individuals. (Tr. 173). The obvious conclusion is that this publication cannot be regarded as a mere hyperbolic venting of emotion, but as a malicious attempt to label these particular plaintiffs with the assertions contained in the publication.

Appellants also contend that because the statement in question is couched in hyperbolic terms, no reasonable man could believe that any of the statements made therein are true. It has already been pointed out that

there are several assertions in this publication which could quite easily be considered as true by the average reader, and which are not hyperbolic terms. In effect, Appellants are saying that what cannot be said directly because of libel, can always be said in hyperbolic terms thus escaping the proscription of libel. This view cannot be rationally supported.

Since there is absolutely no truth to the assertions in the publication in question and since the statement was recklessly made without regard to the truthfulness thereof, the *New York Times* standard has been met. Thus, there are no grounds for reversal even if this Court should find that the Virginia Supreme Court of Appeals incorrectly failed to apply the *New York Times* standard of malice. This Court has often held that where a decision below is correct, it must be affirmed although the lower court relied upon incorrect grounds or gave a wrong reason. *J. E. Riley Inv. Co.* v. *C.I.R.*, 311 U.S. 55, 61 S.Ct. 95, 85 L.Ed. 36 (1940); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943); *Daniels* v. *Allen*, 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953).

V.

CONCLUSION

For the reasons stated herein, the Virginia Insulting Words Statute should be held constitutional and the decision and judgments below should be affirmed. Justice and sound labor policy dictate this result.

Respectfully submitted,

JAMES NEWTON WILHOIT, III
National Right to Work Legal Defense Foundation
1990 M Street, N.W., Suite 400
Washington, D.C. 20036

REX H. REED
National Right to Work Legal Defense Foundation
1990 M Street, N.W., Suite 400
Washington, D.C. 20036

JOHN L. KILCULLEN
Webster & Kilcullen
1747 Pennsylvania Avenue, N.W., Suite 1000
Washington, D.C.

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